

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVE MICHAEL LOPEZ,

Defendant and Appellant.

B291683

(Los Angeles County
Super. Ct. No. YA088246)

APPEAL from an order of the Superior Court of Los Angeles County. Edmund Wilcox Clarke, Jr., Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, and Shezad H. Thakor, Deputy Attorney General, for Plaintiff and Respondent.

* * * * *

The defendant asks us to apply legislation narrowing the applicability of a sentencing enhancement for prior drug convictions to his now-final conviction. Because the text of the legislation and well-settled law grant the benefit of new legislation only to nonfinal convictions, we reject defendant's argument and affirm the order denying him a reduced sentence.

FACTS AND PROCEDURAL BACKGROUND

In 2014, a jury convicted defendant of unlawful possession of a controlled substance for sale (Health & Safety Code, § 11351).¹

On September 16, 2014, the trial court sentenced defendant to prison for seven years. The sentence was comprised of three years for the underlying crime, plus three years under section 11370.2 for having sustained a prior drug conviction,² plus one year for serving a prior prison term (Pen. Code, § 667.5, subd. (b)).

Defendant did not appeal his sentence.

On June 1, 2018, defendant filed a motion to modify his sentence. Specifically, he asked the trial court to strike the three-year enhancement under section 11370.2 because Senate

¹ All further statutory references are to the Health and Safety Code unless otherwise indicated.

² Defendant had sustained two prior drug convictions—a 2004 conviction for possessing a controlled substance for sale (§ 11378) and a 2005 conviction for transporting a controlled substance (§ 11379). However, it is unclear from the record which of the two prior convictions the court used as the basis for the enhancement. For purposes of this appeal, it does not matter.

Bill 180 had amended section 11370.2 in a way that made it inapplicable to either of his prior drug convictions.

The trial court denied the motion because defendant's conviction was final and because Senate Bill 180 was retroactively applicable to, at most, nonfinal convictions.

Defendant filed this timely appeal.

DISCUSSION

Defendant's conviction became final on December 15, 2014, which is the date on which his time to petition the United States Supreme Court for certiorari expired. (*People v. Grzyski* (2018) 28 Cal.App.5th 799, 805, review granted Feb. 13, 2019, S252911.) Senate Bill 180 became law on October 11, 2017 (Stats. 2017, ch. 677, § 1), and became effective on January 1, 2018 (*ibid.*). As a result, defendant's conviction became final long before Senate Bill 180 came about.

Senate Bill 180 does not apply to defendant's final conviction. Penal Code section 3 provides that "[n]o part of [the Penal Code] is retroactive, unless expressly so declared." (Pen. Code, § 3.) This section declares our Legislature's presumptive intent that new penal laws apply only prospectively, not retroactively. (*In re Chavez* (2004) 114 Cal.App.4th 989, 993 (*Chavez*) [so noting].) Of course, this presumption regarding a legislative intent favoring prospective application of new penal laws may be rebutted. Our Legislature can expressly declare that a new law is retroactive, but it did not do so with respect to Senate Bill 180. (See *People v. Gray* (2014) 58 Cal.4th 901, 906 ["the plain meaning of the statute controls"].) Our Supreme Court has also crafted a relevant "counter-presumption"—namely, that our Legislature presumptively intends to apply any new law that ""mitigate[s] the penalty for a particular crime""

retroactively to “all *nonfinal* judgments.” (*People v. Brown* (2012) 54 Cal.4th 314, 324, italics added; *In re Estrada* (1965) 63 Cal.2d 740, 744-745.) But this counter-presumption does not aid defendant because his conviction was final by the time Senate Bill 180 was enacted and took effect.

Defendant offers two sets of arguments in response.

First, he argues that our Legislature evinced an intent to apply Senate Bill 180 retroactively because (1) Senate Bill 180 was aimed at reducing the prison population, and it would be more effective at doing so if applied retroactively to both *nonfinal and final* convictions, (2) making Senate Bill 180 fully retroactive to final convictions is permissible under the federal and California Constitutions and by the above described “counter-presumption,” and (3) *Chavez, supra*, 114 Cal.App.4th 989 supports making Senate Bill 180 applicable to final convictions. We reject these arguments. Senate Bill 180 advances our Legislature’s purpose of reducing prison populations because it reduces sentences imposed after its effective date as well as to previously imposed sentences that are not yet final. (E.g., *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 635 [“we cannot assume our Legislature engaged in an idle act . . .”].) Contrary to what defendant suggests, we need not “interpret [a] statute in every way that might maximize” its purpose (*People v. Morales* (2016) 63 Cal.4th 399, 408), particularly where, as discussed below, there are countervailing reasons not to make Senate Bill 180 fully retroactive. What is more, the fact that our Legislature *could* have made Senate Bill 180 fully retroactive does not shed light on whether it *did*. And *Chavez* is inapt. *Chavez* ruled that a 1993 amendment to a 1977 statute was retroactive to final

convictions because it was meant to ““fix a mistake”” in a 1983 amendment to the statute (*Chavez*, at p. 998); *Chavez* does not stand for the much broader proposition that *all* further amendments to statutes must be construed to be fully retroactive to final convictions. Second, defendant argues that equal protection principles dictate that he receives the benefit of Senate Bill 180 to avoid being treated differently than defendants whose convictions are not yet final (or who have yet to be prosecuted). We disagree. Because “[a] criminal defendant has no vested interest “in a specific term of imprisonment . . . ,”” we employ “rational basis review” and ask only whether there is ““any reasonably conceivable state of facts that could provide a rational basis for the classification.” [Citation.]” (*People v. Turnage* (2012) 55 Cal.4th 62, 74-75, quoting *People v. Wilkinson* (2004) 33 Cal.4th 821, 836 (*Wilkinson*)). Our Supreme Court has recognized that our Legislature has a rational reason for refusing to make new laws that reduce criminal sentences fully retroactive—namely, “to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed sentence as written.” (*In re Kapperman* (1974) 11 Cal.3d 542, 546.) Consequently, “[a] reduction of sentences only prospectively from the date a new sentencing statute takes effect is not a denial of equal protection.” (*People v. Floyd* (2003) 31 Cal.4th 179, 189.) Defendant urges that Senate Bill 180’s partial retroactivity cannot withstand strict scrutiny and cites *People v. Olivas* (1976) 17 Cal.3d 236, but our Supreme Court in *Wilkinson* expressly clipped *Olivas*’s wings and rejected the proposition that “*Olivas* . . . require[s] the courts to subject all criminal classifications to strict scrutiny.” (*Wilkinson*, at p. 838.)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

HOFFSTADT

We concur:

_____, P.J.

LUI

_____, J.

CHAVEZ